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REPORT ON RECENT ETS AND IAQ DEVELOPMENTS

May 27, 1994

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— IN THIS ISSUE —

IN THE UNITED STATES

REGULATORY AND LEGISLATIVE MATTERS

- Congressman sends letter to colleagues opposing non-ETS aspects of OSHA's proposed rulemaking on indoor air and indoor smoking; June 29 deadline remains for public comments, p. 1.
- California EPA releases draft chapters of its own ETS Risk Assessment, p. 3; A.B. 13 passes Senate committee, p. 7.
- R.J. Reynolds launches media campaign; Waxman holds press conference in response, p. 6.

ETS-RELATED LITIGATION AGAINST CIGARETTE MANUFACTURERS

- New wrongful death action filed following Burl Butler's death, p. 8.
- An expert in the *Marks* primary smoking case claims decedent may also have been injured by ETS, p. 9.

ETS/IAQ LITIGATION NOT INVOLVING CIGARETTE MANUFACTURERS

- *Leichtman* assault case is reportedly settled, p. 10.
- *Sherer* privacy case is set for trial in 1995, p. 10.

OTHER DEVELOPMENTS/MEDIA COVERAGE

- Restaurant survey shows economic impact of smoking bans, p. 11.
- Shareholder proposal to ban smoking on American Airlines international flights is voted down, p. 11.

OSHA DOCKET WATCH

Public Comments Received ("9-Series") 1,053

Intention to Appear at Hearing ("10-Series") 6

SCIENTIFIC/TECHNICAL ITEMS

- "Childhood and Adolescent Passive Smoking and the Risk of Female Lung Cancer," p. 12.
- "Prevalence of Asthma and Wheeze in Two Different Climatic Areas of Saudi Arabia," p. 12.

IN EUROPE & AROUND THE WORLD

REGULATORY AND LEGISLATIVE MATTERS

- Canadian government may postpone smoking bans on international flights, p. 13.
- Smoking ban announced for private offices in Singapore, p. 14.

ETS-RELATED LITIGATION NOT INVOLVING CIGARETTE MANUFACTURERS

- Suit is filed in the NSW Dust Diseases Tribunal against Qantas Airways, p. 15.

OTHER DEVELOPMENTS/MEDIA COVERAGE

- NSW Health Department withdraws from sponsorship of a sporting event over ETS-related dispute, p. 15.
- Canadian Ministry of Health funds environmental illness research program, p. 15.

2046362405

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— TABLE OF CONTENTS —

Issue 73 May 27, 1994

IN THE UNITED STATES

REGULATORY AND LEGISLATIVE MATTERS

U.S. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)

[1] OSHA's Proposed Rulemaking on Indoor Air and Indoor Smoking 1

[2] BOMA Members to Discuss Proposed IAQ Regulation at Annual Convention 2

[3] OSHA and EPA Officials Discuss ETS and IAQ at Lawyers' Meeting 2

[5] EPA Science Advisory Board Criticizes Erosion in Research Budget 5

103D CONGRESS

[6] House Subcommittee Holds Hearing on Airliner Cabin Air Quality 5

[7] R.J. Reynolds Launches Advertising Campaign; Waxman Holds Press Conference in Response 6

[8] House Subcommittee Amends and Passes the Risk Assessment Improvement Act 6

STATE AND LOCAL GOVERNMENTS

[9] A.B. 13 is Revived and Sent to Senate Floor in California 7

[10] Florida Enacts Law to Evaluate Air Quality in State Buildings 7

ETS-RELATED LITIGATION AGAINST CIGARETTE MANUFACTURERS

[11] *Bluitt*: Plaintiff Alfred Bluitt Deposed 7

[12] *Broin:* Plaintiffs' Opposition to Defendants' Motion for Rehearing Filed 7

[13] *Butler2*: New Wrongful Death Action Filed in Jones County, Mississippi -- *Butler1*: Plaintiffs File Suggestion of Death 8

[14] *Castano*: Oppositions Filed to Plaintiffs' Intervention Motion 9

[15] *Dunn*: Defendants' Motion to Vacate Trial Date Denied 9

[16] *Marks:* Plaintiff in Primary Smoking Case Designates Expert Who Says ETS Contributed to Decedent's Death 9

ETS-RELATED LITIGATION NOT INVOLVING THE CIGARETTE MANUFACTURERS

BATTERY

[17] *Leichtman v. WLW Jacor Communications, Inc.*, No. A9206918 (Court of Common Pleas, Hamilton County, Ohio) (remanded 1/26/94) 10

WORKPLACE: PRIVACY

[18] *Sherer v. Access Graphics Inc.*, No. 94CV-000134 (District Court, Boulder County, Colorado) (filed February 7, 1994) 10

WORKPLACE: WORKERS' COMPENSATION

[19] *Employer: County of Westchester*, 1994 WL 159498 (New York Workers' Compensation Board) (decided April 19, 1994) 11

LEGAL ISSUES AND DEVELOPMENTS

[20] St. Louis Bar Association Schedules Seminar on Smoking in the Workplace 11

OTHER DEVELOPMENTS

[21] Survey Shows Economic Impact of Smoking Bans on Restaurants 11

[22] American Airlines Shareholders Defeat Smoking Ban Proposal 11

SCIENTIFIC/TECHNICAL ITEMS

LUNG CANCER

[23] "Childhood and Adolescent Passive Smoking and the Risk of Female Lung Cancer," F.-L. Wang, E.J. Love, N. Liu, and X.-D. Dai, *International Journal of Epidemiology* 23(2): 223-230, 1994 [See Appendix A] 12

RESPIRATORY DISEASES AND CONDITIONS - CHILDREN

[24] "Prevalence of Asthma and Wheeze in Two Different Climatic Areas of Saudi Arabia," A. Bener, T.Q. Al-Jawadi, F. Ozkaragoz, and J.A.D. Anderson, *Indian Journal of Chest Disease and Allied Sciences* 35(1): 9-15, 1993 [See Appendix A] 12

[25] "Home Environmental Risk Factors in Urban Minority Asthmatic Children," K. Huss, C.S. Rand, A.M. Butz, P.A. Eggleston, C. Murigande, L.C. Thompson, S. Schneider, K. Weeks, and F.J. Malveaux, *Annals of Allergy* 72: 173-177, 1994 [See Appendix A] 12

2046362406

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ETS EXPOSURE AND MONITORING

[26] "Decreased Fetal Weights in Rats Exposed to Sidestream Cigarette Smoke," P. Rajini, J.A. Last, K.E. Pinkerton, A.G. Hendrickx, and H. Witschi, *Fundamental and Applied Toxicology* 22: 400-404, 1994 [See Appendix A] 12

[27] "Short-Term Effects of Sidestream Smoke on Respiratory Epithelium in Mice: Cell Kinetics," P. Rajini and H. Witschi, *Fundamental and Applied Toxicology* 22: 405-410, 1994 [See Appendix A] 12

INDOOR AIR QUALITY

[28] Study Estimates Productivity Gains from IAQ Improvements at $54.5 Billion 12

[29] "Nitrogen Dioxide Exposures Inside Ice Skating Rinks," M. Bruner and J.D. Spengler, *American Journal of Public Health* 84(3): 429-433, 1994 [See Appendix A] 13

[30] "Air Recirculation and Sick Building Syndrome: A Blinded Crossover Trial," J.J.K. Jaakkola, P. Tuomaala, and O. Seppanen, *American Journal of Public Health* 84(3): 422-428, 1994 [See Appendix A] 13

[31] "Editorial: Building Ventilation and Symptoms -- Where Do We Go from Here?" M.J. Mendell and L. Fine, *American Journal of Public Health* 84(3): 346-348, 1994 [See Appendix A] 13

[32] "Tobacco Smoking Policy and Indoor Air Quality: A Case Study," M.A. Jadud and B.A. Rock, *Energy and Buildings* 20: 143-150, 1993 [See Appendix A] 13

SMOKING POLICIES AND RELATED ISSUES

[33] "Stratification and Smoking: A Search for Class-Based Smoking Lifestyles," J. Goldstein, *Journal of Drug Education* 23(4): 357-373, 1993 [See Appendix A] 13

IN EUROPE & AROUND THE WORLD

REGULATORY AND LEGISLATIVE MATTERS

CANADA

[34] Government Considers Delaying Smoking Ban on International Flights 13

INDONESIA

[35] Smoking Ban on Buses to Be Enforced 14

MALAYSIA

[36] National Smoking Ban Takes Effect 14

SINGAPORE

[37] Smoking to Be Banned in Private Workplaces 14

ETS-RELATED LITIGATION NOT INVOLVING THE TOBACCO INDUSTRY

[38] *Will v. Qantas Airways Limited* (Dust Diseases Tribunal, New South Wales) (filed 1994) 15

OTHER DEVELOPMENTS

AUSTRALIA

[39] Health Agency Withdraws From Sponsorship Agreement 15

CANADA

[40] Ministry Funds Environmental Sensitivity Clinic 15

[41] Revenue Agency Investigating Antismoking Group 15

APPENDIX A ..... Article Summaries

APPENDIX B ..... Upcoming Scientific Meetings

2046362407

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REPORT ON RECENT ETS AND IAQ DEVELOPMENTS

IN THE UNITED STATES

REGULATORY AND LEGISLATIVE MATTERS

U.S. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)

[1] OSHA's Proposed Rulemaking on Indoor Air and Indoor Smoking

On May 6, 1994, Representative Spencer Bachus (R-Ala.) reportedly sent a letter to his House colleagues calling the non-ETS aspects of OSHA's proposed rulemaking on air quality in indoor workplaces too burdensome and costly for employers. He also said the proposed rule is one example of a pending federal mandate that is potentially harmful to employers and the economy. In the letter he reportedly said, "This is $8 billion out of the economy and into satisfying government bureaucracy." He also apparently said he hopes to organize opposition to the proposed rule and convince House members to write letters expressing concern about the proposal to Labor Secretary Robert Reich.

Bachus wants the proposal "rewritten in a way that brings down the employer costs significantly," according to one of his aides. "Most businesses realize it's in their best interest to ban smoking or provide a separate smoking area and take these other steps, but a *Federal Register* notice that is more than 74 pages is saying more than just 'don't smoke.'" *See* BNA *Occupational Safety & Health Reporter*, May 11, 1994.

OTHER ACTIVITIES RELATING TO THE PROPOSED RULEMAKING INCLUDE THE FOLLOWING:

- An attorney speaking at a labor conference reportedly called OSHA's proposed rule an "idea laden with recordkeeping requirements." San Antonio attorney Robert Kilgore said the Clinton administration's proposals for improving workplace safety rely on getting "flashy headlines" and creating "paperwork wars" rather than ensuring better working conditions. According to another attorney at the conference, Robert Miller of Denver, OSHA and Reich are "looking for flash and publicity," while Kilgore said the agency is looking for "headlines and fines." Kilgore also said that the increased number of workplace regulations "will lead to new heights of an adversarial relationship." The remarks were made at the Labor and Employment Law Conference held recently in Washington, D.C.
- OSHA's Deputy Assistant Secretary Richard Hayes recently told a group of state legislators that many state governments are "far ahead" on several job safety fronts, including smoking in the workplace. He reportedly said that the procedure OSHA will follow with regard to the proposal was "novel" in that it will rely on town hall-type meetings to help the agency decide how to proceed.
- R.J. Reynolds Tobacco Company (RJR) has filed a letter with OSHA asking for a 60-day extension of the June 29, 1994, deadline to submit public comments on the proposed rule. RJR listed as grounds for the request the following: (i) that critical documents and information relied on by OSHA have not been made available for public comment; (ii) that a comment period of at 120 days is necessary for a rulemaking of this scope; and (iii) that requests of this nature are routinely granted by OSHA. OSHA officials have publicly stated they have received requests for extension of the deadline from others.
- According to the public docket relating to the rulemaking, OSHA has received notices of intention to appear at public hearing from five individuals representing BOMA, the AMA, the American Industrial Hygiene Association (AIHA), Gobbell Hays Partners, Inc., and ASHRAE. A notice was also received from an international flight attendant. OSHA's public comment ("9-series") docket indicates 1,053 public comments have been re-

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ceived thus far, although an agency source reports that an additional 2,000 have been received but not yet docketed.

As of this writing, OSHA has not extended any of its deadlines for submitting comments. The previously set deadline of July 5 for submitting written materials to be presented at the still-scheduled July 12 public hearing was moved to June 29 in a *Federal Register* notice of correction. On May 26, Assistant Secretary of Labor in charge of OSHA Joseph Dear confirmed that hearings on the proposal will begin this summer. Making no mention of extending the comment period, Dear stressed that the proposed rule is a "comprehensive standard for indoor air quality" and not only a rule about ETS. Dear made the comments during a presentation at the annual AIHA meeting on May 26.

[2] BOMA Members to Discuss Proposed IAQ Regulation at Annual Convention

A "legislative briefing" on OSHA's proposed rule to regulate air quality in indoor workplaces is on the agenda for the upcoming annual convention of the Building Owners and Managers Association International (BOMA). Since the proposed rule was announced on March 25, 1994, BOMA officials generally have approved of its smoking-related provisions but criticized its building maintenance requirements.

The four-day convention is scheduled to begin June 19, 1994, in San Diego, California. The OSHA legislative briefing is slated for 8:00 a.m. on June 21.

According to the convention agenda, "BOMA is seriously concerned with the prospect of record-keeping requirements, complaint logs, fines, penalties, maintenance records, and training costs, and the government's failure to stress 'source reduction' as the best approach to take." The agenda does not mention ETS specifically.

BOMA's support of smoking restrictions is well established. In January 1993, citing the EPA Risk Assessment on ETS, the organization passed a resolution supporting federal legislation to ban smoking in the workplace. In February 1994, BOMA publicly endorsed the "Smoke-Free Environment Act" (H.R. 2343), a bill that would restrict smoking to separately ventilated areas in virtually every non-residential building in the United States.

[3] OSHA and EPA Officials Discuss ETS and IAQ at Lawyers' Meeting

On May 17, 1994, two top IAQ officials from OSHA and EPA spoke at a meeting of the Environmental Law Committee of the District of Columbia Bar. The speakers were Charles Adkins, director of Health Standards Programs at OSHA, and Robert Axelrad, director of the Indoor Air Division of EPA.

HIGHLIGHTS FROM ADKINS' PRESENTATION:

- OSHA's proposed rule on air quality in indoor workplaces has two scopes: IAQ and ETS. The IAQ scope would apply to all non-industrial worksites, i.e., anything other than the floor of a manufacturing business; the ETS scope applies to all workplaces which have one or more employees. Adkins said the ETS part of the rule would apply to hotels, bars, restaurants and enclosed sports arenas and that a lot of people "are becoming unglued at these provisions."
- Under the IAQ scope, there is no requirement that a new ventilation system be installed if the existing system does not meet the provision of the rule.
- Smoking areas in existence in bars and restaurants today would not meet the requirements of the proposed rule. The only way that restaurants and bars can comply is by installing separately ventilated negative pressure ventilation systems, Adkins said.
- OSHA expects that the rule may wind up in the courts, and Adkins said he thinks OSHA would prevail.
- OSHA has done its own risk assessment and has not identified a safe level of exposure to many indoor air contaminants. In regard to ETS, Adkins said that it was not part of the manufacturing process and therefore should not be in the workplace. He said, "banning smoking is the cheapest thing you can do."
- OSHA has received several requests for an extension of the public comment period attributed to the absence of certain reference citations in the public docket. OSHA is looking at these requests from a legal standpoint, but in Adkins' view the missing references are fairly insignificant because these documents were public at all times. He said no decision had been made on the matter. He also said

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OSHA was awaiting a ruling from the DC Circuit Court of Appeals on the ASH petition.

- If no decision is forthcoming from the DC Circuit Court in one or two weeks, than it will probably be several months before a decision is issued. (The court heard oral argument in the case on May 12, 1994. *See* issue 72 of this Report, May 13, 1994.)
- There is a likelihood that the public hearings could be postponed, but this decision would be made within the next couple of weeks. If the hearings are postponed because the public comment period is extended, then it is possible that the hearings would not be held until next calendar year.
- It is possible that OSHA may adopt a final rule if the hearings are held; if not, OSHA has prepared a secondary proposal if necessary. Adkins said cost data will go into the record and possibly a new regulatory analysis. He believes OSHA has a good risk assessment and good cost data.

HIGHLIGHTS FROM AXELRAD'S PRESENTATION:

- EPA's role in dealing with IAQ evolved from Title IV of Superfund amendments, according to Axelrad. Axelrad's office addresses ETS because no other office in the agency has authority to deal with it, he said.
- The agency has little information about IAQ mixtures. Axelrad called multiple chemical sensitivity a gray area, and he stated that "the science is not there."
- The Indoor Air Division is a small non-regulatory program whose primary purpose is to provide education, information development and training. Axelrad held up the Building Air Quality notebook as a product his office has produced, and he outlined some of the steps the agency is making to increase the book's usage. These steps include the Building Air Quality Alliance, which the agency hopes to launch sometime in September, Axelrad said.
- The mark-up session for the "Smoke-Free Environment Act" (H.R. 3434) was one of the most intense 2 1/2 hours debates Axelrad had seen. He indicated that it "is anybody's guess whether it gets out of the full committee." Axelrad also talked about two bills in the Senate, S.1680 and S.262, and said he did not know if the two bills would move forward.
- The House Indoor Air Quality Act (H.R.2919) has "set a lot of people on edge" because it would give EPA regulatory authority on IAQ issues. Axelrad said the EPA is "not interested in seeking regulatory authority" but that the agency supported the bill and he guessed it would move in the Congress "once the Congress finished beating the hell out of the tobacco industry." He said this Administration supported all the indoor air legislation in contrast to the last Administration.
- The issue of carpet emissions is "rivaling ETS for my time." Axelrad said that even though the agency did not have the science, he thought that some people were sensitive to emissions at very low levels.
- EPA has a "good" relationship with OSHA. Axelrad hopes to involve OSHA in some of the EPA initiatives, particularly the Building Air Quality Alliance partnership program. He indicated that the OSHA rule would "go through litigation at the other end."
- In response to a question regarding when the EPA stopped looking at studies relating to the Risk Assessment on ETS, Axelrad said the tobacco industry was making "too much" out of this issue. He reiterated the total weight of evidence analysis that the agency had gone through and coupled that with what the EPA knew about mainstream smoke to come out with the Class A categorization of ETS. Mr. Axelrad said that the risk assessment had been reviewed by 18 independent experts and they had agreed with EPA's findings and that the tobacco industry "thinks very highly of these guys" including Dr. Mort Lippmann, head of the Committee on Indoor Air Quality.

ENVIRONMENTAL PROTECTION AGENCY (EPA)

[4] CalEPA Releases Draft Chapters of ETS Risk Assessment

The California Environmental Protection Agency (CalEPA) has released for public comment two external review drafts on environmental tobacco smoke: *Respiratory Health Effects of Environmental Tobacco Smoke* and *The Role of Environmental Tobacco Smoke in Cancers Other Than Lung Cancer.* They are summarized briefly at the end of this discussion.

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Written comments on the drafts must be received by CalEPA no later than June 24, 1994. The address for comments is ETS Assessment, Office of Environmental Health Hazard Assessment, 2151 Berkeley Way, Annex 11, Room 408, Berkeley, California 94704-1011.

A public workshop will be held on June 14, 1994, at which the public apparently will have an opportunity to present oral comments. The workshop will be held in Room 136 at 2151 Berkeley Way, Berkeley, California. The transmittal letter for the external review drafts contains no instructions for appearing at the workshop but says questions may be directed to Joyce Smylie at (510) 540-2084.

The two drafts represent chapters of an overall risk assessment of ETS being prepared by the agency's Office of Environmental Health Hazard Assessment (OEHHA). Other chapters are to discuss reproductive and developmental endpoints, cardiovascular endpoints, lung cancer, and ETS chemical composition and exposure measurement. It is presently unclear whether the remaining four chapters will be released for public comment.

At this time, it appears as though the ETS assessment document is not being prepared for any precise legislative or regulatory purpose. However, it is likely that it will serve as a resource to local governments and business owners/operators in California who are considering enacting smoking bans or restrictions.

Respiratory Health Effects of Environmental Tobacco Smoke. This document discusses alleged potential non-cancer respiratory health effects of exposure to ETS. Acute health effects discussed include asthma (exacerbation), respiratory infections, otitis media, and sensory irritation and annoyance. Chronic health effects include asthma (induction), chronic respiratory symptoms (e.g., wheezing), decreased lung development, and chronic obstructive lung disease in adults. The document also contains a discussion of what it calls "susceptible" populations, such as children with atopy/atopic dermatitis and cystic fibrosis. The major conclusions from each section of the document are as follows:

Acute Effects

- Parental smoking is associated with the exacerbation of asthma in children, and ETS exposure may also be associated with the exacerbation of asthma in adults.
- Parental smoking is associated with an increased risk of acute lower respiratory tract illnesses in children, especially in children under 3 years of age.
- In California, "ETS-related otitis media cases may result in an estimated 134,000 office visits per year among children under the age of three years."

Chronic Effects

- "There is consistent and compelling evidence that ETS [exposure] is a causal factor for induction of new cases of asthma."
- "In California, between 960 and 3,120 new cases per year may be ETS-related."
- Parental smoking is associated with chronic respiratory symptoms in children such as cough, phlegm and wheezing.
- "While the results from all studies are not wholly consistent, there is sufficient evidence that childhood exposure to ETS affects lung growth and development, as measured by pulmonary function tests."
- These associated reductions in lung function may persist into adulthood.
- "The effect of chronic ETS exposure upon pulmonary function in otherwise healthy adults is likely to be small, and unlikely by itself to result in clinically significant chronic disease."
- However, ETS exposure, in combination with "other insults," could "contribute" to chronic respiratory impairment in adults.

Sensitive Populations

- Children with atopy and cystic fibrosis are particularly "sensitive" to ETS, and ETS exposure appears to "significantly exacerbate" cystic fibrosis.

The Role of Environmental Tobacco Smoke in Cancers Other Than Lung Cancer. This document contains the following conclusions:

- "The association between exposure to ETS and nasal sinus cancer in nonsmokers (examined in one cohort and two case-control studies) was consistently shown to be positive, implicating ETS

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[exposure] as a causal factor of nasal sinus cancers in nonsmokers."

- "Epidemiological studies show some evidence of an association between cervical cancer and ETS [exposure]."
- "The finding of detectable levels of tobacco constituents (nicotine and cotinine) in the cervical mucus of nonsmokers provides biological plausibility to the association of ETS [exposure] and cervical cancer."
- "The evidence for epidemiologic studies of ETS [exposure] and bladder cancer, however, is inadequate."
- "The evidence for an association between ETS exposure and breast cancer in nonsmokers is inadequate."
- "The single cohort study conducted was not supportive of an association between ETS [exposure] and stomach cancer."
- "The epidemiologic evidence linking ETS [exposure] to brain tumors is inadequate."
- "The epidemiologic evidence for an association of parental smoking and risk of leukemia in children is conflicting. . ."
- "There is inadequate evidence of an association between ETS exposure and risk of other diseases of the hemopoietic and lymphatic system."
- "The epidemiologic evidence on ETS exposure and other rare childhood cancers is also inadequate."

[5] EPA Science Advisory Board Criticizes Erosion in Research Budget

Given EPA's "desperate need" for a stronger science base, the long-term erosion in EPA's research budget as a percentage of its total budget is "especially disturbing," the agency's Science Advisory Board reportedly told EPA Administrator Carol Browner in an April 1994 letter. According to the letter, EPA's research budget has declined from approximately 20 percent of the total budget in 1980 to less than seven percent in President Clinton's request for 1995. The letter is said to advocate an integrated management system for planning, budgeting, implementing and overseeing the activities of the EPA Office of Research and Development. *See Inside EPA*, May 13, 1994.

103D CONGRESS

[6] House Subcommittee Holds Hearing on Airliner Cabin Air Quality

Flight attendants and the representatives of the airline industry provided differing viewpoints on air quality in airline cabins during a May 18, 1994, hearing of a House aviation subcommittee. The hearing pertained to a bill now pending in the subcommittee, the "Safe Cabin Air Quality Act of 1993" (H.R. 2985), which would require the Federal Aviation Administration (FAA) to set standards for commercial airline cabins relating to ventilation, filtration and humidity.

"Flight attendants and passengers on many flights are not provided adequate amounts of air," the president of the Association of Flight Attendants, AFL-CIO, told the subcommittee. "Thus, they may be exposed to unacceptable amounts of bacteria, viruses and other potential health risks -- without the protection of adequate federal regulations."

But the president of the Air Transport Association said the air on commercial aircraft, although dry, "does not pose a health risk." He said the quality of air exceeds that of most other closed spaces, and that the air cleaning and recirculation system is better than that in offices and homes. "No valid study done by government or industry has ever found airline air quality to be the cause of health problems and airline passengers should continue to be confident in airline safety and air quality," he said.

Others who testified at the hearing included officials from the FAA, the Department of Transportation, the Centers for Disease Control and EPA. *See PR Newswire*, May 18, 1994; *The Reuter European Business Report*, May 18, 1994; *The Associated Press*, May 19, 1994.

The Safe Cabin Air Quality Act was introduced in August 1993 by Representative Jerrold Nadler, a democrat from New York. The May 18 hearing represents at least the second time airliner air quality was discussed at a subcommittee hearing during the 103d Congress. On October 5, 1993, flight attendant Deanna Clarke appeared before the Senate Subcom-

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mittee on Labor in connection with OSHA Reform legislation. *See* issues 58 and 59 of this Report, October 22 and November 5, 1993.

[7] R.J. Reynolds Launches Advertising Campaign; Waxman Holds Press Conference in Response

R.J. Reynolds Tobacco Company (RJR) held a press conference on May 22, 1994, to announce a multi-million dollar national public information campaign to tell its viewpoint regarding the debate on smoking. Appearing at the press conference were Maura Ellis, RJR's director of external communications, and Chris Coggins, a toxicologist and principal scientist at RJR.

The first full-page advertisement of the campaign, "Secondhand Smoke: How Much Are Non-Smokers Exposed To?" ran on May 23 in such publications as *The Wall Street Journal, The New York Times, USA Today, The Washington Post, National Journal* and *Roll Call.* The ad features the slogan "Together, We Can Work It Out" and discusses ETS exposure levels for nonsmokers in the workplace and home. A second ad, which ran on May 26, carries the same slogan and features a reprint of a *Wall Street Journal* editorial entitled, "Smoke & Mirrors: EPA Wages War on Cigarettes." The ad discusses the EPA Risk Assessment on ETS and states that "some scientists and commentators have concluded that the data do not justify the EPA's conclusion. So is it time to ask questions?"

In announcing the campaign, a company spokesperson said, "R.J. Reynolds believes it's time for the public to understand that various efforts by the government to totally ban smoke in the workplace throughout the country are simply not supported with science." The company plans a series of national ads dealing with different aspects of the smoking controversy.

In a press report, Chief Executive Officer Jim Johnston was quoted to say, "We want to get a more reasoned debate than exists today," and was asked if Reynolds would be able to air similar ads on television, to which he replied, "If this is America, we can." Future ads are expected to address the issues of smoking bans, taxes and the rights of business owners. *See The Wall Street Journal,* May 23, 1994.

In response the RJR's announcement, California Representative Henry Waxman (D) held a press conference the same day denouncing the campaign as "slick propaganda." Waxman said, "They want to have this wisp of uncertainty on the question of secondhand smoke, despite the fact that there's overwhelming scientific consensus. They know that if the press will report this as a controversy, they win."

During the press conference, Waxman was asked about the findings in the Congressional Research Service's (CRS) report on ETS that suggest ETS "is not as much a threat as some in Congress would want us to think." Waxman admitted a CRS statistician "bought the argument" but said he had a recent letter from the CRS that "indicates that they have not made any finding on the matter whatsoever. As a matter of fact, they're conducting an investigation in the scientific questions, and we've asked them to give us their opinion." Waxman said that according to the CRS letter he has, the CRS has taken no institutional position of the alleged health effects of ETS exposure yet, but plan to take an official position "later on."

When asked if he thought the RJR campaign was an attempt to slow down his bill, "The Smoke-Free Environment Act of 1993" (H.R. 3434), Waxman said he expects the bill to move forward "if the press is not misled to think that perhaps it's an open question and will look at the science on this issue and not the paid propaganda."

[8] House Subcommittee Amends and Passes the Risk Assessment Improvement Act

On May 18, 1994, a House subcommittee voted to pass with amendments the Risk Assessment Improvement Act of 1994 (H.R. 4306). The bill, introduced in late April by Representative Herbert Klein (D-N.J.), would create a risk analysis system that would, according to Klein, "establish a sound basis for judging the seriousness and the magnitude of our environmental problems." The measure does not mandate that a risk assessment be conducted by EPA for every rule; instead, it requires that a program director develop risk assessment guidelines and see to it the guidelines are "to the extent permitted by law, conducted, applied, and practiced throughout the Office of the Agency."

Amendments passed by the subcommittee would require or allow for the following: (i) the use of qualified individuals to conduct independent scientific peer reviews and written responses to any reviewer's

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comments; (ii) the establishment of an infrastructure for regulatory meetings between state and federal authorities; (iii) the identification of priority risk assessment research issues in a report to Congress; (iv) a public comment period on risk assessment; and (v) the creation of a national research council study to complement the risk assessment pilot program provided for in the bill.

The subcommittee that passed the bill was the House Technology, Environment and Aviation Subcommittee. The bill will now go before the House Committee on Science, Space and Technology. No hearing date has yet been scheduled. Further details on the measure appear in issue 72 of this Report, May 13, 1994.

STATE AND LOCAL GOVERNMENTS

[9] A.B. 13 is Revived and Sent to Senate Floor in California

After being stalled for months, a bill that would restrict smoking to separately ventilated areas in most indoor workplaces throughout California (A.B. 13) has been reported out of committee and sent to the full Senate for action. The bill already has been approved by the state Assembly.

The measure went to the Senate floor after two hostile amendments reportedly were removed. One of the removed amendments would have allowed restaurants to set aside up to 25 percent of their seating for smokers, subject to the development of an acceptable ventilation standard by Cal-OSHA. The other would have prohibited local governments from passing ordinances that exceeded A.B. 13's provisions.

The sponsor of the bill, Assemblyman Terry Friedman (D-Los Angeles), reportedly estimates that the current version of A.B. 13 would prohibit smoking in about 97 percent of the state's enclosed workplaces. *See* BNA *California Safety & Health Report*, May 23, 1994; *The San Diego Union-Tribune*, May 17, 1994; *Gannett News Service*, May 17, 1994; *United Press International*, May 16, 1994.

[10] Florida Enacts Law to Evaluate Air Quality in State Buildings

Florida officials must rate the indoor air quality in 5,000 state buildings and propose ways to improve the buildings' fresh air levels under a bill signed into law on May 11, 1994, by Governor Lawton Chiles (D). The agency responsible for carrying out the statute's requirements is the Department of Management Services, which is to report back to the legislature by January 1, 1995.

Florida's 2,645 public schools reportedly are included in the program. According to a news report, the measure passed unanimously in both the Florida House and Senate, and was actively supported by the Florida AFL-CIO and other labor unions. *See* BNA *Occupations Safety & Health Reporter*, May 18, 1994.

ETS-RELATED LITIGATION AGAINST CIGARETTE MANUFACTURERS

[11] *Bluitt*: Plaintiff Alfred Bluitt Deposed

On May 25, 1994, the defendants deposed plaintiff Alfred Bluitt, the husband of the decedent. Defendants are scheduled to depose plaintiff Ajula Bluitt, the decedent's adult child, on June 1.

Plaintiffs in this action allege Willie Ruth Bluitt was a nonsmoker who died of lung cancer as a result of workplace exposure to environmental tobacco smoke. Defendants in the action are the six major U.S. cigarette manufacturers. *Bluitt v. R.J. Reynolds Tobacco Co., et al.* (U.S. District Court, Eastern District, Texas) (filed August 30, 1993).

[12] *Broin*: Plaintiffs' Opposition to Defendants' Motion for Rehearing Filed

On May 25, 1994, the plaintiffs submitted their opposition to the defendants' petition for rehearing, rehearing *en banc* and certification. Plaintiffs had requested an additional one-week extension of time to file their response, from May 18 to May 25, in a motion filed on May 16. The Court of Appeal granted the motion for extension of time on May 24. The defendants are seeking rehearing of the appellate court's March 15 decision that reversed the trial court's 1992 order dismissing plaintiffs' class action allegations.

On May 18, at a trial court hearing on defendants' pending motions, Judge Robert Kaye granted motions to dismiss based on jurisdictional grounds filed by several of the non-manufacturing tobacco company

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entities. Defendants that were dismissed included American Brands, BATUS, BGLS, UST, Inc., and several Philip Morris entities. Judge Kaye denied the Tobacco Merchants' Association's motion to dismiss based on lack of jurisdiction. He took under advisement a motion to dismiss filed jointly by all defendants. Prior to the hearing, plaintiffs submitted a verified proffer and offer of evidence to establish a basis for their punitive damages claim. The defendants had filed a joint motion to strike plaintiffs' claims for punitive damages in conjunction with their motion to dismiss, and the plaintiffs' May 18 filing was submitted in response.

The plaintiffs have noticed the deposition of Addison Yeaman, the former General Counsel of Brown & Williamson, for June 13, 1994, in Louisville, Kentucky. Plaintiffs have also noticed Merrell Williams, a former employee of a Louisville law firm that represents Brown & Williamson, for deposition on June 14.

The plaintiffs deposed James Johnston, an executive of R.J. Reynolds, on May 26.

At issue in this case are the claims of 28 flight attendants allegedly injured by occupational exposure to ETS. In addition, the husband of one of the flight attendants claims loss of consortium. The 28 attendants purport to represent a class of approximately 60,000 other attendants.

Injuries alleged by the putative class representatives include lung cancer, breast cancer and unspecified respiratory ailments. Plaintiffs further allege that occupational exposure to ETS on board aircraft causes at least 22 diseases and a reasonable fear of contracting such diseases. The defendants are the six major U.S. cigarette manufacturers (plus entities related to some of the manufacturers), United States Tobacco Company, Dosal Tobacco Corp., the Council for Tobacco Research, The Tobacco Institute, and three trade associations. *Broin, et al. v. Philip Morris, et al.* (Circuit Court, Dade County, Florida) (filed October 31, 1991).

[13] *Butler2*: New Wrongful Death Action Filed in Jones County, Mississippi -- *Butler1*: Plaintiffs File Suggestion of Death

On May 12, 1994, a complaint for wrongful death (*Butler2*) was filed in the Circuit Court of Jones County, Mississippi, by Burl Butler's estate, which is represented by its personal representative, Ava Dean Butler. The case is brought on behalf of all wrongful death beneficiaries of Burl Butler. Defendants in the action are Philip Morris, Inc.; Philip Morris Companies, Inc.; Brown & Williamson Tobacco Corp.; BATUS, Inc.; R.J. Reynolds Tobacco Company; RJR Nabisco, Inc.; Liggett Group, Inc.; Liggett & Myers, Inc.; Brooke Group, Ltd.; American Brands, Inc.; American Tobacco Company; Loews Corp.; Lorillard Corp.; the Council for Tobacco Research -- U.S.A., Inc.; Tobacco Institute Research Committee; The Tobacco Institute, Inc.; Hill & Knowlton, Inc.; Laurel Cigar and Tobacco Company and Does A-Z. Plaintiffs filed a first amended complaint on May 19 in which claims against B.A.T. Industries, Inc. were added.

Plaintiffs contend in the complaint that Burl Butler's death was caused by lung cancer, and that the lung cancer was caused by his exposure to environmental tobacco smoke. Causes of action asserted in the complaint include breach of express warranty, breach of implied warranty, negligence, strict liability, misrepresentation, absolute liability, conspiracy, and fraud. The complaint includes allegations that the defendants were aware of the addictive nature of nicotine and regulated the amounts of nicotine in their products to induce addiction. Plaintiffs seek $50,000,000 in actual damages from all defendants individually, jointly and severally. They seek $600,000,000 in punitive damages from the cigarette manufacturers and their holding companies individually, jointly and severally.

The case was filed by the Jackson, Mississippi, law firm of Langston, Frazer & Sweet, and a sole practitioner in Jackson, Cynthia Langston Lott. These are the same representing the plaintiffs in the personal injury action, which was filed in Hinds County (*Butler1*). Four other firms are also listed in the complaint as plaintiffs' counsel: Ronald Motley and Charles Patrick of the Ness, Motley, Loadholt, Richardson & Poole firm of Charleston, South Carolina; Don Barrett, counsel for plaintiffs in the *Horton* and *Wilks* cases; Dan C. Taylor, a sole practitioner in Ellisville, Mississippi; and David McCormick of the Pascagoula firm of Cumbest, Cumbest, Hunter & McCormick. Mr. Patrick was recently added as a co-counsel for plaintiffs in the personal injury case.

In the personal injury action (*Butler1*), the defendants have noticed a deposition of the records custodian of the U.S. Environmental Protection Agency for June 2.

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On May 9, the plaintiffs filed a suggestion of death that notifies the Circuit Court of Hinds County of Burl Butler's death on May 7.

On May 20, the defendants filed several motions in the Hinds County case. Hearings on the motions have been set for July 8. These motions are directed to discovery issues, the preservation of evidence from Burl Butler's autopsy, and prejudicial publicity by the plaintiffs and their counsel.

Burl Butler and his wife, Ava Dean Butler, filed suit in 1992 contending that Mr. Butler, a barber from Laurel, Mississippi, developed lung cancer as a result of his exposure to environmental tobacco smoke. The defendants in this case consist of the six major U.S. cigarette manufacturers and several local retailers. *Butler v. R.J. Reynolds Tobacco Company, et al.* (Circuit Court, Hinds County, Mississippi) (filed October 21, 1992). Burl Butler died on May 7, 1994. Five days later, a wrongful death case was filed in Jones County by Mr. Butler's estate alleging that his death was caused by exposure to environmental tobacco smoke. Defendants in the wrongful death case are the six major U.S. cigarette manufacturers, their holding companies, The Tobacco Institute, the Council for Tobacco Research, Hill & Knowlton, a local distributor of cigarettes, and Does. *Butler v. Philip Morris, Inc., et al.* (Circuit Court, Jones County, Mississippi) (filed May 12, 1994). Both cases are pending.

[14] *Castano*: Oppositions Filed to Plaintiffs' Intervention Motion

On May 19, 1994, the defendants and the plaintiffs in the underlying lawsuit submitted oppositions to the motion for intervention. The hearing on the motion for intervention is scheduled to be held on May 27.

The intervention motion was filed on April 7, 1994, by nonsmokers who claim injury from ETS exposure. They seek to intervene in a purported class action lawsuit brought by smokers who are raising claims of nicotine manipulation and addiction against a number of tobacco companies. The named movants purport to represent a class that would generally include all residents of the United States who have never smoked cigarettes and who claim to have been injured by ETS at home or in the workplace generated by persons addicted to tobacco. The proposed plaintiffs seek unspecified actual damages, a disgorgement of profits, and a judicial declaration that chronic exposure to ETS in the home or workplace is hazardous to human health. Defendants named in the motion to intervene include five major tobacco manufacturers and their parent companies. *Castano, et al. v The American Tobacco Company, et al.* (U.S. District Court, Eastern District, Louisiana) (filed March 29, 1994; motion to intervene filed April 7, 1994).

[15] *Dunn*: Defendants' Motion to Vacate Trial Date Denied

On May 12, 1994, Judge Robert Barnet denied the defendants' joint motion to vacate the trial date of March 6, 1995.

Plaintiffs in this case contend that Mildred Wiley was a nonsmoker who died of lung cancer as a result of workplace exposure to environmental tobacco smoke. Her husband, Philip Wiley, is also asserting a loss of consortium claim. Defendants in the case are each of the six major U.S. cigarette manufacturers, parent companies of three of the manufacturers, The Tobacco Institute, and the Council for Tobacco Research. *Dunn v. RJR Nabisco Holdings Corporation, et al.* (Superior Court, Delaware County, Indiana) (filed May 28, 1993).

[16] *Marks*: Plaintiff in Primary Smoking Case Designates Expert Who Says ETS Contributed to Decedent's Death

On May 16, 1994, the plaintiff designated two expert witnesses. One of the two experts, Paulette Blanchet, M.D., stated in her expert report, also dated May 16, 1994, that the decedent informed Dr. Blanchet in 1991 that she had quit smoking 13 years before. Dr. Blanchet further stated that "[i]t is my understanding that she continued to be exposed to passive smoke. If this is the case, I have the opinion that the patient's lung carcinoma very possibly was a result of the smoking exposure, as this has been suggested in the literature both from active and passive smoking." Dr. Blanchet, an oncologist in Lafayette, Louisiana, treated the decedent, according to her expert report, in June and July of 1991. The other expert witness designated by the plaintiff on May 16 did not contend in his expert report that exposure to ETS contributed to the

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decedent's cancer. Pursuant to the pending scheduling order, defendants are to complete their depositions of the plaintiff's expert witnesses by June 30. Prior to the submission of Dr. Blanchet's expert report, plaintiff had not made any allegations in this case that ETS contributed to or caused the decedent's cancer.

Plaintiff contends that his decedent, Verna Marks, died of lung cancer caused by smoking cigarettes from 1952-1980. The defendants in this case are R.J. Reynolds and Philip Morris. *Marks v. R.J. Reynolds Tobacco Co., et al.* (U.S. District Court, Western District, Louisiana) (filed September 15, 1992).

ETS-RELATED LITIGATION NOT INVOLVING THE CIGARETTE MANUFACTURERS

BATTERY

[17] *Leichtman v. WLW Jacor Communications, Inc.*, No. A9206918 (Court of Common Pleas, Hamilton County, Ohio) (remanded 1/26/94)

According to a news report, an Ohio antismoking activist has tentatively agreed to settle the lawsuit he filed after a radio talk show host allegedly blew cigar smoke in his face during a 1991 interview. The activist, Ahron Leichtman, alleged that the incident amounted to a battery, and he argued that he had suffered "a personal indignity akin to being spat upon." The terms of the settlement were not disclosed.

Leichtman's case was dismissed by the trial court in 1993, but his battery claim was reinstated by the Ohio Court of Appeals in early 1994. *Leichtman v. WLW Jacor Communications, Inc.*, 1994 WL 19097 (Ohio Ct. App. 1/26/94). *See* issue 65 of this Report, February 5, 1994).

The appeals court allowed Leichtman to pursue his claim because he alleged that the talk show host, Randy Furman, acted deliberately, "for the purpose of causing physical discomfort, humiliation and distress." The court drew a clear, bright line between Furman's alleged conduct and the routine act of smoking in public. "Leichtman's claim for battery is based exclusively on Furman's commission of a deliberate act," the court said. "We do not . . . adopt or lend credence to the theory of a 'smokers battery,' which imposes liability if there is a substantial certainty that exhaled smoke will predictably contact a nonsmoker."

The appeals court remanded the case to the court of common pleas for trial. A trial date was about to be scheduled when the parties reached the reported settlement. *See The Cincinnati Post*, May 18, 1994.

WORKPLACE: PRIVACY

[18] *Sherer v. Access Graphics Inc.*, No. 94CV-000134 (District Court, Boulder County, Colorado) (filed February 7, 1994)

According to a docket sheet, the trial judge has tentatively set a jury trial date of March 27, 1995, for this case, in which a smoker claims he was fired because he was seen smoking at a mall during his lunch hour. The smoker, Paul Sherer, claims that his former employer, Access Graphics Inc., violated a Colorado law prohibiting employment discrimination against those who engage in lawful activities during nonworking hours.

This is only known case in which a smoker is trying to enforce a state privacy statute. But in Florida -- a state that does not have a privacy statute comparable to Colorado's -- a case now pending in the state Supreme Court involves a smoker's constitutional challenge to a city policy making smokers ineligible for employment. *See City of North Miami v. Kurtz*, No. 82836. In the *Kurtz* case, which has not yet been scheduled for argument, the city is appealing from a Court of Appeal decision that struck down the no-smokers policy. *See Kurtz v. City of North Miami*, 625 So. 2d 899 (Fla. Ct. App. 10/12/93). The appellate court held that plaintiff Arlene Kurtz had an overriding privacy interest under the Florida Constitution in not disclosing information about personal matters of a lawful nature that bore no relation to the job for which she had applied.

According to a company spokesperson, Access Graphics refuses to hire smokers in order to control health-insurance costs. Sherer, who is suing for unspecified damages, is reportedly receiving full unemployment benefits following his termination from employment. A referee with the Division of Employment and Training apparently ruled on November 10, 1993, that Sherer "shall not be consid-

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